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Victoria Sutton

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ASKING THE RIGHT QUESTIONS: BODY SCANNERS, IS *SALUS POPULI* *SUPREME LEX*¹ THE ANSWER?

Victoria Sutton[†]

INTRODUCTION TO THE TSA BODY SCANNER POLICY

The body scanning device, used at some airports to view through passenger's clothing to the surface of the skin, is considered to be a major improvement toward ensuring that weapons or explosives are not carried onto commercial aircraft, making airline travel safer, and the nation more secure. In the ten years since September 11, 2001, airport security has become increasingly invasive. Air passengers must now choose either a full-body scan or a very thorough pat-down. If a traveler opts for the body scan, she must step into a room-like enclosure, hold her hands above her head, and allow the body scanner device to produce a nude image of her. An agent of the Transportation Security Administration (TSA), in a room situated away from the scanning area, examines the scan and "clears" the person if there is no problem, at which point the TSA personnel with the passenger will give her permission to proceed on her journey. If anything suspicious is discovered, the TSA personnel conduct a pat down or perhaps detain the passenger for questioning.

The body scanners purchased and installed by the Transportation Security Agency are of two kinds of technologies. The first is backscatter technology and the second is millimeter wave technology. Backscatter technology works by photographing the pattern of the

¹ The maxim *salus populi suprema lex* is the law of all courts and countries and is a well-recognized principle of law and means that "the individual right sinks in the necessity to provide for the public good. The only question has been, as to the extent of the powers that should be conferred for such purposes," *Haverty v. Bass*, 66 Me. 71, 74 (1876).

[†] Victoria Sutton, MPA, PhD, JD is the Director of the Center for Biodefense, Law and Public Policy and Horn Professor of Texas Tech University School of Law. Her Ph.D. work focused on risk perception. She also served as the former Chief Counsel of the Research and Innovative Technology Administration of the U.S. Dept of Transportation (2005-7) and former Assistant Director, Office of Science and Technology Policy, the Executive Office of the President (1990-93).

photons bouncing off of certain materials, revealing its shape, when digitized and shown on a monitor to TSA personnel. This comes from a low intensity x-ray delivered to the body, the interface of the technology with the human body. The millimeter wave technology operates similarly, but uses non-ionizing radiation in the radio wavelength area to bombard the body and record the bouncing of the waves from materials or objects on the body. Whether the amount of radiation exposure is significant enough to warrant warnings to the public and employees has not been clearly articulated or communicated, and therefore possibly not clearly determined.

The body scanner policy raises a number of legal questions which at first impression are fairly obvious ones, but there are others, not so obvious. First, does the value of the scanner information and its contribution to airline safety outweigh the burden on the individual giving up privacy by revealing a clear outline and the contours of their body to an individual employed by TSA and with no specific legal assurances that it will not become an archival record? Framed in its constitutionally grounded principle of privacy, this is the question most often asked. Is the privacy interest always the same, or does the interest change when the compelling state interest is national security?

Second, do we need to ask if the body scan is a reasonable search and seizure or does the passenger hold such a diminished expectation of privacy in this activity that the Fourth Amendment protections against unreasonable search and seizure are not triggered?

Third, does the right to travel heighten the burden on the government to demonstrate that the body scanner does not present an unreasonable invasion of the privacy interest, or pose an unreasonable search or seizure or is the right to travel so narrowly interpreted as a fundamental right as to not be infringed when there is another route to reach your destination? Or to what extent does the inconvenience of lengthier ground transportation to that of air travel create such a burden on the right to travel as to be a coercion and a constitutional infringement on a fundamental right?

Fourth, the question could be asked if authorities have been exceeded under either of two theories. Has TSA exceeded the statutory authority in implementing body scanning devices, or has Congress given away too much action of a legislative nature to the Executive Branch? The judiciary has not found any action by Congress to have given too much legislative authority to an agency in what has been called the non-delegation doctrine, since 1935;² and rarely does a court determine that an agency has gone beyond the powers delegated

² A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935),

to it in a statute in an, *ultra vires* claim. But even when a convincing argument has been made that the agency has exceeded their authority given them in the statute, the court has simply asked that the agency go back and rethink their interpretation and issue a revised action, rather than invalidate the regulation.³

Fifth, did the TSA give notice to the public about the use of the body scanners in a procedurally meaningful way? The Administrative Procedure Act (APA) requires a notice and comment process for substantive actions.⁴ Has TSA violated this provision of the APA and thereby denied those affected by the scanners due process?

Sixth, is there any analogous use of technology that is used for national security purposes, yet has potential health effects? That question is easily answered for military personnel, where personal health risks are outweighed by national security interests when the circumstances are severe enough and immediate enough, as in the anthrax vaccination program. However, there was never a severe or immediate enough risk to require anthrax vaccinations of civilians. The smallpox vaccination legislation which implemented smallpox vaccinations for the public was quickly abandoned as the perception of risk faded, changing the balance in the balancing test.

Seventh, finally, if the body scanners do pose a risk, and will be utilized the same as a diagnostic test, which is classified as a device under the Federal Food, Drug and Cosmetic Act (FDCA), has it been adequately evaluated to be used on the public through the FDCA approval process for non-medical radiation emitting devices?⁵

TSA might respond with these arguments: (1) that the privacy interest is not infringed because the compelling state interest in national security is high when balanced against the privacy burden on the individual traveler; (2) that there is no need to do a further reasonable search and seizure analysis because the reasonable expectation of privacy is not exceeded by the body scanner in the context of traveling on an airline in post 9/11 America; (3) the right to travel is a fundamental right that is not infringed where there is the option to take another travel route; and (4) TSA has not exceeded the statutory authority delegated to it by Congress by utilizing body scanning technology; and (5) no procedural due process was needed, because it is not a rulemaking procedure; and (6) the national security interest outweighs even the non-military privacy interest, because it is the highest of governmental interests; and (7) FDA has provided a webpage with information about the safety of the body scanner devices.

³ Whitman v. American Trucking Ass'n, 531 U.S. 457 (2001).

⁴ 5 U.S.C. § 553 (2012).

⁵ See Federal Food Drug & Cosmetic Act, 21 U.S.C. §§ 301–399 (2012).

TSA's incorporation of body scanners into their statutory screening duty to utilize technology to achieve the most safety for airline travel as possible, poses an unprecedented exposure to radiation by the federal government. Even if the TSA prevails on its argument that no rulemaking was necessary because the body scanners are internal operating procedures which are exempt from rulemaking procedural due process, there is one more question that must be asked.

I. CHALLENGES TO THE TSA BODY SCANNER POLICY

The development of the body scanner program in airports began in 2007 as a way to do secondary screening of passengers, after they had passed through a magnetometer for metal detection. But after TSA decided to expand the use of the body scanners for field testing to certain airports in 2009, it very quickly moved to institute the program as a primary means of scanning in early 2010. By the end of 2010, TSA had 486 scanners at 78 airports, with plans to add 500 more before the end of 2011.⁶

The legal challengers to the TSA's body-scanning policy as an unreasonable search have come from two groups, airline pilots⁷ and passengers.⁸ Their cases were heard within two days of each other, and both were dismissed for lack of subject matter jurisdiction. Review of orders issued by TSA is within the exclusive jurisdiction of the U.S. Court of Appeals. One of the opinions noted that the U.S. Court of Appeals in the District of Columbia had heard oral arguments on the body scanner policy, and that a decision from the court with substantive jurisdiction would be forthcoming, indicating that there should be some resolution of these issues although not heard in this court. Less than two weeks later, the U.S. Court of Appeals for the District of Columbia, in *Electronic Privacy Information Center v. United States Department of Homeland Security*, held that the action taken by TSA was substantive and should have been subjected to the rulemaking process under the APA.⁹ The court, rather than invalidating the TSA's action because of broader policy concerns,¹⁰ directed the TSA to start over and follow the formal rulemaking process. In a

⁶ See *Elec. Privacy Info. Ctr. v. U. S. Dep't of Homeland Security*, 653 F.3d 1, 3 (D.C. Cir. 2011).

⁷ *Roberts v. Napolitano*, 798 F. Supp.2d 7 (D.D.C. 2011).

⁸ *Durso v. Napolitano*, 795 F. Supp.2d 63 (D.D.C. 2011).

⁹ *Elec. Privacy Info. Ctr.*, 653 F.3d at 3. See also 5 U.S.C. § 553.

¹⁰ The court did not vacate the rule because it would "severely disrupt an essential security operation . . . and [the rule] is otherwise lawful . . ." *Id.* at 6.

surprising response, TSA asked the court to “make clear that on remand” that they could use the ‘good cause’ exception to rulemaking,¹¹ and that they would not be precluded from invoking another exception to the rulemaking process in light of the court’s decision, to which the court simply said that question was not reached by the court.¹² At this time, the TSA has not responded with a notice of proposed rulemaking.

II. WHAT QUESTIONS SHOULD BE ASKED?

A. Privacy Interest, the Public Health Interest, and the National Security Interest

The privacy interest when weighed against a national security interest is one of the least favorable ones for the privacy interest because the national security interest is so high. Are all substantial governmental interests the same? The case law suggests that they are not.

Public health has been established as one of the duties of state government in *Gibbons v. Ogden* as distinct from those of the federal government, wherein the court explained that health laws are part of the body of laws that were not surrendered by states.¹³ Going further, the United States Supreme Court has also found that public health is one of the important duties of states, for example. As the Supreme Court held in *Jacobson v. Massachusetts*, the protection and preservation of the public health is among the most important duties of state government.¹⁴

Our constitutional principle of federalism requires that interests of national security are fundamental to the role of national government. Indeed, the Constitution begins with that mandate: “The People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility provide for the common defence . . . do ordain and establish this Constitution for the United States of America”¹⁵ This power is “delegated to the United States by the Constitution . . . ,”¹⁶ and Congress has the power “[t]o provide for

¹¹ The exception states that “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,” then the agency does not have to engage in the rulemaking process. 5 U.S.C. § 553(b)(3)(B) (2012).

¹² *Elec. Privacy Info. Ctr.*, 653 F.3d at 8.

¹³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 205 (1824).

¹⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹⁵ U.S. CONST., pmbl.

¹⁶ *Id.*, amend X.

calling forth the Militia . . . and repel invasions”¹⁷ James Madison suggested in *The Federalist Papers* that “[s]tate legislatures will be unlikely to attach themselves sufficiently to national objects . . . ,”¹⁸ interpreting the national security interest to fall clearly within the power of the national government.

The national security interest was first invoked in a First Amendment case of free speech, *Schenck v. United States*, where Justice Holmes articulated the test which allowed the restriction of the fundamental right of free speech for the compelling state interest of national security based upon the “clear and present danger” test.¹⁹

More recent cases portray the national security interest as the most important of any governmental interest. The Supreme Court held in *Haig v. Agee* that, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”²⁰ According to another more recent perspective, “it is frequently said that national security is the most basic requirement of any society. The argument is that all other interests are dependent on the preservation of the nation itself and hence all such interests must be subordinated to national security.”²¹ Thus, the national security interest is greater than a public health interest, except when the public health interest is also a national security interest, which is a recent development in our understanding of national security law. Given the high interest that public health assumes when combined with national security interest, how will that change our analysis with the body scanner policy, if any?

B. Fourth Amendment Protection against Unreasonable Search and Seizure

The Fourth Amendment of the Constitution provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²²

¹⁷ *Id.*, art. I, § 8, cl. 15.

¹⁸ THE FEDERALIST NO. 46, at 298 (James Madison) (Clifford Rossiter ed. 1961).

¹⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²⁰ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

²¹ Thomas I. Emerson, *Symposium: National Security and Civil Liberties: Introduction*, 69 CORNELL L. REV. 685, 685 (1984).

²² U.S. CONST., amend. IV.

Airport searches are subject to the limitations of Fourth Amendment. The “Terry stop” from *Terry v. Ohio* is the legal authority for the need to do immediate searches without the need to obtain a warrant,²³ yet courts have been unconvinced that this would apply to airport searches.²⁴ However, case law has developed to conclude that there is an implied consent by passengers when they buy a ticket and choose to travel by air. The specific application in airport searches is also well developed in the case law. The Ninth Circuit has held the justification for warrantless searches to be done at the implied consent of the passenger.²⁵ More recently, the Ninth Circuit found that purchasing a ticket with the intent to fly is implied consent to be searched.²⁶

Early cases dealing with airport searches dealt with the question of whether private action was the same as public conduct when security screening was handled by private airlines and contractors, and before the establishment of the federal government agency, the Transportation Security Administration.

Airport searches have long been identified as “administrative searches,” and this was confirmed recently in *Electronic Privacy Information Center v. United States Department of Homeland Security* in July 2011, where the court held that “the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack.”²⁷ Further the search must be “no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives . . .”²⁸ Passengers “may avoid the search by electing not to fly.”²⁹

Passengers and pilots challenged the body scanner policy, characterizing it as an “order,”³⁰ which is reviewable by U.S. Courts of Ap-

²³ *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁴ *United States v. Davis*, 482 F.2d 893 at 905–8 (9th Cir. 1973).

²⁵ *United States v. Homburg*, 546 F.2d 1350, 1352 (9th Cir. 1976). In *Davis*, the court “held that the justification for warrantless screening searches is the implied consent of the passenger.” 482 F.2d at 913.

²⁶ *United States v. Aukai*, 440 F.3d 1168 (9th Cir. 2006), *vacated en banc* 497 F.3d 955 (9th Cir. 2007).

²⁷ *Elec. Privacy Info. Ctr. v. U. S. Dep’t of Homeland Security*, 653 F.3d 1, 10 (D.C. Cir. 2011) (citing *United States v. Aukai*, 497 F.3d 955, 958–63 (9th Cir. 2007) (*en banc*)).

²⁸ *Davis*, 482, F.2d at 913.

²⁹ *Id.*

³⁰ *Roberts v. Napolitano*, 798 F. Supp.2d 7, 10 (D.D.C. 2011). An “order” for review under 49 U.S.C. § 46110 requires that the agency determination be final, but also “it ‘must determine rights or obligations or give risk to legal consequences.’” *Id.* (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (citation omitted)).

peal which has exclusive jurisdiction.³¹ In both cases, the passengers and pilots asked the courts to review the constitutionality of the body scanner policy with regard to whether it failed to protect persons against unreasonable searches and seizures. However, in both cases, the plaintiffs filed their complaints in the U.S. District Courts, where the court had to dismiss them based on jurisdictional reasons, never reaching the search and seizure question.

C. Right to Travel

The courts have held that the “constitutional right to travel may not be conditioned upon the relinquishment of another . . . right.”³² As the court opined, a compelling government interest must exist and the search cannot be based upon consent alone.³³

The burden on the traveler’s right to travel must be greater than the governmental interest to find a constitutional infringement on the right. If there can be a quantitative way of measuring this burden, surely a recent Gallup poll comes as close as any to a fit. A Gallup poll reveals that more than three-fourths of travelers approve of full body scanners. In a Gallup poll conducted in January 2010, 78 percent of a sample of people who had traveled two or more times during the past year said they approved of full body scanners in airports.³⁴ But is this the right question to ask, if travelers are unaware of the health burden, only the convenience factor is being considered in the individual’s burden analysis because they don’t have the information to make a decision about the health choice?

The true voluntariness of an airport search is far from conclusive. While a passenger is not compelled to travel by air, many travelers would be reasonable to conclude that there is really no viable alternative. The question of where voluntariness ends and coercion begins, is where the right to travel is burdened. However, where the compelling governmental interest is national security, the infringement on the individual right to travel will have to be extremely heavy to outweigh the national security interest. This suggests that body scanners will continue to be utilized due to their extremely light burden on travel

³¹ 49 U.S.C. § 46110(c) provides for review exclusively by U.S. Court of Appeals to “affirm, amend, modify, or set aside any part of . . .” a TSA order.

³² *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1248 n.8 (9th Cir. 1989) (quoting *Davis*, 482 F.2d at 913).

³³ *\$124,570 U.S. Currency*, 873 F.2d at 1248 n.8.

³⁴ Jeffrey M. Jones, *In U.S., Air Travelers Take Body Scans in Stride*, GALLUP POLITICS (Jan. 11, 2010), <http://www.gallup.com/poll/125018/air-travelers-body-scans-stride.aspx>.

and privacy when weighed against a national security interest directly served by searching passengers for dangerous possessions.

D. *Ultra Vires* Challenges to Agencies Acting Within the Scope of Their Authority

The TSA was created by the Transportation and Aviation Security Act of 2001 “to prevent terrorist attacks and reduce the vulnerability of the United States to terrorism within the nation’s transportation networks.”³⁵ The Administrator of TSA is charged with “the overall responsibility for civil aviation security.”³⁶ Further, Congress directed the head of TSA to provide for the screening of all passengers and property before boarding aircraft to ensure that no passenger is unlawfully carrying a dangerous weapon, explosive or other destructive substance. The Administrator must give “high priority to developing, testing, improving and deploying” technologies at airport screening checkpoints to detect “nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property,” including such weapons and explosives that “terrorists would likely try to smuggle aboard.”³⁷

TSA has the authority to use the body scanning devices most recently by statute by the Intelligence Reform and Terrorism Prevention Act of 2004.³⁸

TSA’s delegated authority is clearly for passenger screening as well as research and development of new technologies for that purpose. If the agency has exceeded the statutory authority in implementing body scanning devices, the judiciary has not found any agency exceeding their statutory authority in an *ultra vires* claim, since 1935,³⁹ so it is unlikely. But even when a convincing argument has been made that the agency has exceeded the authority given them in the statute, the court has simply asked that the agency go back and rethink their interpretation, rather than invalidate the regulation.⁴⁰

³⁵ Redfern v. Napolitano, 2011 U.S. Dist. LEXIS 49321 at *2 (citation omitted)).

³⁶ *Id.* See also 49 U.S.C. §§ 114(a)-(b), (d) (2012).

³⁷ 49 U.S.C. § 44925(a) (2012).

³⁸ *Id.*; Elec. Privacy Info. Ctr. v. U. S. Dep’t of Homeland Security, 653 F.3d 1, 2 (D.C. Cir. 2011).

³⁹ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935),

⁴⁰ Whitman v. American Trucking Ass’n, 531 U.S. 457 (2001).

E. Fifth Amendment, Procedural Due Process

The Constitution requires procedural due process before the government can pronounce laws affecting the interests of persons.⁴¹ Procedural due process protects individuals by providing that they cannot “be deprived of life, liberty, or property, without due process of law.”⁴² When a federal government agency engages in rulemaking, the APA ensures that basic procedural protections are followed for any substantive changes to the rules, or any binding agency action.⁴³

The determination by the D.C. Circuit in *Electronic Privacy Information Center v. United States Department of Homeland Security* made clear that the action taken by the TSA in instituting the body scanner policy was actually a “rulemaking” and should have been subjected to the notice-and-comment rulemaking process prescribed by the APA.⁴⁴ Specifically the court held that the decision to institute body scanners was one which should have been subjected to notice-and-comment rulemaking.⁴⁵ First, the court held that the TSA’s body scanner policy is not merely an “interpretation” because “it substantially changes the experience of airline passengers and is therefore not merely ‘interpretive’”⁴⁶ The court next held that it was not merely a “general statement of policy” because “an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding.”⁴⁷ Further, the affected parties (travelers) believe it is binding and are “‘reasonably led to believe that failure to conform will bring adverse consequences.’”⁴⁸ The court then concluded that the TSA’s body scanner the policy is a substantive rule, subject to the constraints of the notice and comment rulemaking process, because it “substantively affects the public to a degree sufficient to implicate the policy interest animating notice-and-comment rulemaking.”⁴⁹

⁴¹ U.S. CONST., amend. V.

⁴² *Id.*

⁴³ 5 U.S.C. §553 (2012).

⁴⁴ *Elec. Privacy Info. Ctr. v. U. S. Dep’t of Homeland Security*, 653 F.3d 1, 3 (D.C. Cir. 2011).

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted)).

⁴⁸ *Elec. Privacy Info. Ctr.*, 653 F.3d at 5 (quoting *Gen. Elec. Co.*, 290 F.3d at 383–84 (citation omitted)).

⁴⁹ *Elec. Privacy Info. Ctr.*, 653 F.3d at 6.

The TSA needs to subject this new policy to the notice and comment procedures laid forth in the APA. Providing the proper procedural due process will help ensure that the substance of the policy is legitimate and makes good use of federal resources in very sensitive and important areas—the safety of air passengers and broad national security concerns.

F. Civilians v. Military and Privacy

There is a small but significant difference between military and civilian rights when weighed against the national security interest, the theory being that by voluntarily joining the military, those individual interests are by consent, diminished. This is through the waiver of consent by the President⁵⁰ for unapproved drugs and devices on behalf of the enlisted members of the military service when it is warranted by national security interests.

The military anthrax vaccination policy initiated after the anthrax attacks of 2001 was not sustainable, as the perceived threat of another attack diminished and evidence of a more serious burden on individual health emerged. That program ended, even with this waiver of consent by the President for the interests of national security.

G. The Public Health Perspective on Body Scanners

A unique public-private partnership exists which establishes a wide range of standards for commercial products. The American National Standards Institute (ANSI), a private sector organization, convenes groups of experts to create standards for everything from gasoline pump nozzles to radiation-emitting body scanning devices. The National Institute of Standards and Technology (NIST), a government agency, then adopts those standards for governmental regulatory and compliance purposes. ANSI organizes groups of experts who work in the manufacture of the technologies and are familiar with the standards generally considered acceptable. NIST, in cooperation with

⁵⁰ 10 U.S.C. 1107(f)(1) (“In the case of the administration of an investigational new drug or drug unapproved for its applied use to a member of the armed forces in connection with the member’s participation in a particular military operation, the requirement that the member provide prior consent to receive the drug in accordance with the prior consent requirement imposed under section 505(i)(4) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355(i)(4) may be waived only by the President. The President may grant such a waiver only if the President determines, in writing, that obtaining consent is not in the interests of national security.”)

ANSI, promulgates standards that address issues of, not only safety, but also uniformity for commercial purposes.⁵¹

In the case of radiation-emitting devices for security screening, ANSI has developed (and NIST adopted) standards through its National Council on Radiation Protection and Measurements (NCRP) in coordination with the Health Physicists Society (HPS). In this particular area, the Food and Drug Administration which regulates non-medical radiation emitting devices, also adopts the standards developed by ANSI/HPS through the NCRP in this public-private partnership.⁵²

In addition to this regulatory process, the federal government established the Interagency Steering Committee on Radiation Standards (ISCORS)

to foster early resolution and coordination of regulatory issues associated with radiation standards and guidelines. The Committee has not been delegated any authorities established by law, regulation, Executive Order, or other administrative mechanisms to act in lieu of formal agency action. The Committee works to facilitate information exchange and produces various documents.⁵³

In July 2008, after about a year of testing body scanners as a secondary screening method, the ISCORS published a report entitled *Guidance for Security Screening of Humans Utilizing Ionizing Radiation*. ISCORS also represented the document as guidance for making decisions about using such devices. At about the same time another independent review was being done by NIST. The report was prepared and dated July 9, 2008 by NIST, assessing radiation and compliance of a body scanner with the ANSI standard.⁵⁴

The FDA has contributed to the dialogue by creating a webpage for information on the body scanners which is the only place that the

⁵¹ See generally NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY INFORMATION TECHNOLOGY LAB, PROCEDURES FOR THE DEVELOPMENT OF AMERICAN NATIONAL STANDARDS (2008), available at <http://www.itl.nist.gov/ANSIASD/NISTITLANSProcedures-ReaccreditedMarch182008.pdf>.

⁵² See generally *Our Mission*, NAT'L COUNCIL ON RADIATION PROTECTION & MEASUREMENTS, http://www.ncrponline.org/AboutNCRP/Our_Mission.html (last visited Apr. 1, 2012).

⁵³ U. S. INTERAGENCY STEERING COMM. ON RADIATION STANDARDS, GUIDANCE FOR SECURITY SCREENING OF HUMANS UTILIZING IONIZING RADIATION, (July 2008), available at <http://www.iscors.org/doc/GSSHUIR%20July%202008.pdf>.

⁵⁴ AM. NAT'L STANDARD N43.17: *RADIATION SAFETY FOR PERSONNEL SECURITY SCREENING SYSTEMS USING X-RAYS* (Am. Nat'l Standards Inst. 2002).

public can go to see anything about the body scanner's effects on health.⁵⁵

The opacity of information related to radiation emitted by the body scanners comes from security concerns on the part of the TSA. It has redacted much of the information that explains the extent of the radiation produced by body scanners, and how deeply the radiation penetrates. Its actions in withholding this information in response to a Freedom of Information Act (FOIA) request were upheld by the U.S. District Court for the District of Columbia.⁵⁶ Lowering of standards might also raise questions with the timing for the change in the allowable standard for radiation dose per screening from 10 millirems in 2002 to 25 millirems in 2009, the standard allowing more radiation per dose by two and a half times from the 2002⁵⁷ standard to the 2009⁵⁸ standard. The ISCORS guidance includes the previous lower standard, 10 millirems per dose because the new 2009 standard had not yet been published. Assume we accept the 2009 higher standard of 25 millirems as the acceptable dose for each exposure then we must also accept that there will be some health effect, that will be more than negligible which has been found to be 1,000 millirems annually, according to the ANSI/CHRP Report 116⁵⁹ upon which these decisions have relied, in part. This information alone, demands that a consideration of the governmental interest balanced against the risk be done.

IV. SEARCHING FOR PRECEDENT: VACCINATION AS A MODEL

If the decision to use body scanners was based on a national security interest which has been determined to outweigh its potential negative health effects on human health, then are there any precedential analogous situations which might be useful in our analysis? Examining the example of the childhood vaccinations requirement should

⁵⁵ *Radiation Emitting Products: Products for Security Screening of People*, FOOD & DRUG ADMIN., <http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/SecuritySystems/ucm227201.htm> (last updated Dec. 23, 2010).

⁵⁶ *Elec. Privacy Info. Ctr. v. U. S. Dep't of Homeland Security*, 760 F.Supp. 2d 4, 7 (D.D.C. 2011).

⁵⁷ AM. NAT'L STANDARD N43.17: *RADIATION SAFETY FOR PERSONNEL SECURITY SCREENING SYSTEMS USING X-RAYS* (Am. Nat'l Standards Inst. 2002).

⁵⁸ ANSI N43.17: *RADIATION SAFETY FOR PERSONNEL SECURITY SCREENING SYSTEMS USING X-RAY OR GAMMA RADIATION* (Am. Nat'l Standards Inst. 2009).

⁵⁹ NAT'L COUNCIL ON RADIATION PROTECTION & MEASUREMENT, REPORT NO. 116 – LIMITATION OF EXPOSURE TO IONIZING RADIATION (1993).

give insight into those cases when a privacy interest in the form of a health interest must be weighed against a substantial governmental interest, in this case public health and the prevention of epidemics. This is not a perfect analogy because while the first part of the test is a privacy interest, the governmental interest is public health and not national security. In Part III there are indications that the national security interest is the most compelling and important of the governmental interests which would be more compelling than the public health interest, alone.

Like a vaccination program, could the body scanner policy be required as part of a Public Health Emergency declaration, thereby changing the analysis? A Public Health Emergency (PHE) can be declared under the Public Readiness and Emergency Preparedness Act of 2005⁶⁰ the first one was declared on October 1, 2008 for the anthrax vaccine. These declarations are primarily to provide immunity to the manufacturer of the countermeasure, which could have been purchased pursuant to the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), which provides for waivers of immunity in declared emergencies.⁶¹ The Food, Drug and Cosmetic Act can then be triggered by the PHE to issue their own agency's order to authorize products for use in emergencies,⁶² which might include the body scanner device, which is in their jurisdictional scope for approval of non-medical radiation emitting devices.

Key elements in the declaration state that pursuant to Section 319F-3 of the Public Health Service Act, (this provision originating from the Public Readiness and Emergency Preparedness Act of 2005) the Secretary of Health and Human Services may declare a public health emergency.⁶³ The declared purpose and reason typically read: "Therefore, pursuant to section 319F-3(b) of the Act, I have determined there is a credible risk that the threat . . . constitutes a public health emergency."⁶⁴

Returning to the analysis of the public health threat that is also a national security interest, there are several examples of this analysis and five examples of a PHE. The analysis for the smallpox vaccination program in 2003, was a case where vaccination burdens were weighed against a national security interest which was also a public

⁶⁰ 42 U.S.C. § 247d-6d (2011).

⁶¹ 6 U.S.C. §§ 441-444 (2011).

⁶² 21 U.S.C. § 360 bbb-3 (2011).

⁶³ 42 U.S.C. § 247d-6d.

⁶⁴ Kathleen Sebelius, *Determination that a Public Health Emergency Exists*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 22, 2010), http://www.hhs.gov/secretary/phe_swh1n1.html.

health interest in the Smallpox Emergency Personnel Protection Act of 2003 (SEPPA).⁶⁵ Other actions have involved the same governmental interest in national security interest where it was also a public health interest: the Public Health Emergency Declaration of October 1, 2008 for anthrax, and in five other declarations of a Public Health Emergency for H1N1.⁶⁶ The analysis for the body scanner policy then changes from the privacy interest in a search and seizure (which is very low) being outweighed by a national security interest to a test where the privacy interest in health is outweighed by a national security interest which is also a public health interest (an interest in averting death from an undiscovered WMD). If the last test is used, then utilizing a Public Health Emergency declaration would obfuscate claims of a rulemaking failure and in addition could waive potential liability to the manufacturers of the body scanners, and claims of a rulemaking failure.

The constitutional test with childhood vaccinations begins with weighing the privacy interest, in which is embodied a personal health interest, against the substantial governmental interest of public health. Although there is a risk to the individual child receiving the vaccination of mild to severe health consequences, including death, the benefit of preventing widespread childhood disease epidemics has been determined to be the most important interest. For example, a smallpox vaccine required for children until 1974, resulted in one death for each million children vaccinated, but a risk that was considerably better than a smallpox epidemic with a 30 percent mortality rate.

Could you apply the same test to the body scanners policy? The privacy interest is very analogous – a risk of injury to health from both the vaccinations and the body scanners; however the substantial governmental interest is not the same. The substantial governmental interest in the vaccination case is protecting public health; whereas, the substantial public interest in the body scanners is protecting national security. However the public health interest is evolving into a national security governmental interest in a number of recent cases. For example, there have been at least six Public Health Emergencies (PHE) declared by the President using the authority of the Public Health Act⁶⁷ which cites the governmental reason that “a public health emergency exists nationwide involving Swine Influenza A (now called 2009 H1N1 flu) that affects or has significant potential to affect

⁶⁵ Pub. L. No. 108-20, 117 Stat. 642 (2003) (codified as amended in scattered sections of 42 U.S.C.).

⁶⁶ Sebelius, *supra* note 65.

⁶⁷ 42 U.S.C § 247d (2011).

national security.”⁶⁸ This declaration removed product liability claims for countermeasures that could be developed and purchased by the government in response to the declared PHE, which might be tamiflu-like products or vaccinations. The first such declaration was for the declaration of a public health emergency for anthrax attacks, and it is still in effect until December 2015.⁶⁹ Thus, vaccinations in this context would be the burden on the privacy interest or health interest balanced against national security, rather than public health.

If we can now conclude that the privacy interest in a health interest in the burden of body scanners is outweighed by a national security interest which is also a public health interest can we also conclude that it is analogous to the anthrax vaccine and the national security interest in public health emergency declarations? If so, TSA could utilize the declaration of a Public Health Emergency for using body scanners to prevent the use of weapons of mass destruction in passenger air transportation, instead of a rulemaking.

CONCLUSION AND RECOMMENDATION

Returning to the original question, posited in the title, whether we are asking the right questions, is *salus populi supreme lex*⁷⁰ the simple answer? Simply subordinating individual interests to the public good does not exist in the pure form that the Supreme Court articulated in 1876, when they sought to define the powers of the federal government. Now the question has become one of a balancing test of whether the national security interest is sufficiently served to balance the burden on individual rights. The burden on individual rights can be characterized as either one of convenience or public health. The answer must be yes, however, the mechanism of the PHE remains unreviewable. The burden on convenience is easily answered in a poll of the public, and that answer was that 78 percent of the people support it. However, if the burden is on health, not convenience, freedom to travel, privacy against search and seizure, then the question is one

⁶⁸ Sebelius, *supra* note 65.

⁶⁹ Declaration Under the Public Readiness and Emergency Preparedness Act, 73 Fed. Reg. 58,239–58,242 (Oct. 6, 2008).

⁷⁰ The maxim *salus populi suprema lex* is the law of all courts and countries and is a well-recognized principle of law and means that “the individual right sinks in the necessity to provide for the public good. The only question has been, as to the extent of the powers that should be conferred for such purposes,” *Haverty v. Bass*, 66 Me. 71, 74 (1876).

which must consider the impact to health and the certainty and the urgency of the governmental interest in national security.

If the body scanner policy is understood within the framework of a PHE, then the federal government can avoid the constraints of the balancing test. A public health interest can be the same as a national security interest in some cases, which is then balanced against the individual's health burden, may fall into the new jurisprudence of national security interests as public health interests.

While individuals in the military have a diminished right of privacy in health interests, the balancing test of individual privacy in health was outweighed by the national security interest in the anthrax vaccination program. Even that balance was changed, as the perceived threat of an anthrax attack decreased in urgency and magnitude. The balance changed to weigh more heavily the individual health interest, and the program was stopped. Non-military individuals do not have diminished individual rights or interests, nor has the public consented to the waiver of any of them. Therefore the balancing of the perceived threat to national security will have to be substantial to sustain a burden for very long on the public, and that applies to the body scanner policy. SEPPA is another example of a quickly diminished national security interest, yielding to a private health interest, ending the program.⁷¹

So while the national security interest is the greatest of all governmental interests, it must be at a heightened and urgent level to sustain a burden on the private health interest.

The answer then, is that there are two choices with the body scanner policy. The body scanner policy can be analyzed as a national security interest which will almost certainly outweigh the individual privacy interest, but could be sustainable only so long as the perceived threat is high enough to balance the individual burden. The individual health interest weighed against the national security interest when it is also characterized as a public health interest (aversion of death by a WMD on an aircraft), could be ordered through a Public Health Emergency declaration using the President's power, and the program could be sustainable for the foreseeable future without judicial review, since the review of a President's decision is extraordinary. The choices then are the more heavy-handed approach to declare a Public Health Emergency, and avoid the individual rights balancing test as well as the rulemaking process altogether, because it is no longer a rulemaking. Or, TSA could follow the advice of the Court of Appeals

⁷¹ Pub. L. No. 108-20, 117 Stat. 642 (2003) (codified as amended in scattered sections of 42 U.S.C.).

in *Electronic Privacy Information Center v. United States Department of Homeland Security*, and proceed to a rulemaking process, to adequately give notice to the public about the details of the impacts to health, and graciously accept the Court's decision not to invalidate the entire program in the interim, while once the rulemaking process finishes, it cures the constitutional procedural due process defect.